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No. 89-259

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

PETER DEMOSTHENES, Warden,
Nevada State Prison,

Petitioner,

v.

JIMMY NEUSCHAFER,

Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals
Ninth Circuit

BRIEF OF AMICI CURIAE THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, MISSOURI, NEW MEXICO, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, WASHINGTON, WYOMING, AND THE COMMONWEALTH OF PUERTO RICO, IN SUPPORT OF PETITIONER, THE STATE OF NEVADA

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QUESTIONS PRESENTED.

1. Whether, as a matter of law, a state habeas petitioner's claim that he did not litigate certain claims in his first federal petition because they were unexhausted and thus barred from consideration by this Court's holding in Rose v. Lundy 455 U.S. 509 (1981), precludes a finding that the petitioner deliberately withheld those claims from his first federal petition and abused the writ when he brought them in a second petition?

2. Whether this Court should adopt the plurality approach enunciated in Rose v. Lundy, supra, and hold that a petitioner who deliberately sets aside his unexhausted claims in favor of litigating fully exhausted claims in a first federal habeas petition, risks dismissal of a subsequent federal petition that raises those previously unexhausted issues,

because the latter petition constitutes an abuse of the writ under Sanders v. United States 373 U.S. 1 (1963), Rule 9(b) of the Rules of Governing Section 2254 Cases in the United States District Courts, and 28 U.S.C. § 2244(b)?

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INTEREST OF AMICUS CURIAE

Amici are States which have significant contact with the federal court system since prisoners housed in prisons in these states file federal habeas corpus petitions.

Amici are concerned about the adverse effect of successive federal habeas petitions on the finality of state court judgments and the capacity of states to defend against successive federal petitions with limited state resources.

The decision of the Ninth Circuit here has concluded that withholding of claims from a habeas corpus petition to exhaust state remedies and raising these same issues in a subsequent petition does not constitute an abuse of the writ under habeas corpus rule 9(b) of section 28 USC 2254. (Neuschafer v. Whitley 860 F.2d 1470 (9th Cir. 1988).)

This result is contrary to the plurality holding of this Court in Rose v. Lundy, supra, 455 U.S. 509, and decisions of other Courts of Appeal. It will result in piecemeal litigation which will force amici to respond to repeated petitions for writs of habeas corpus and unnecessarily expend limited resources in doing so. Amici also have a strong interest in the finality of the judgments of their state courts. Allowing piecemeal litigation of habeas petitions however, will lead to situations where state judgments may never be final.

Amici also have numerous inmates on death row who have an interest in engaging in piecemeal litigation to delay and avoid imposition of capital punishment. (See e.g., Woodard v. Hutchins 464 U.S. 377, 378-379 (1983).)

Statistics show that as of December 31, 1987, there were 1,984 inmates were

under a sentence of death in the various states that have the death penalty. United States Department of Justice, Bureau of Justice Statistics Bulletin. Permitting this number of inmates to engage in piecemeal habeas corpus litigation will obviously impose a great burden on limited state resources.

If the mistaken Ninth Circuit decision remains uncorrected, it will promote unnecessarily burdensome habeas corpus litigation for the States that need to respond to petitions for writs of habeas corpus, and will unduly burden the federal court system. (See e.g., Thigpen v. Smith 792 F.2d. 1507 (11th. Cir. 1986).)

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REASON FOR GRANTING THE WRIT

A HABEAS PETITIONER'S CLAIM THAT HE DID NOT LITIGATE CERTAIN CLAIMS ON AN INITIAL FEDERAL PETITION BECAUSE THEY WERE UNEXHAUSTED SHOULD NOT BE A DEFENSE AS A MATTER OF LAW TO A CLAIM THAT THE PETITIONER HAS ABUSED THE WRIT OF HABEAS CORPUS

Certiorari should be granted in this case to consider the important question whether a claim by a habeas corpus petitioner that he has deliberately withheld issues from a previous habeas corpus petition because he has not exhausted state remedies as to these issues constitutes a valid defense to a claim by a state that the habeas petitioner has abused the writ pursuant to Rule 9(b) of the rules governing federal habeas corpus.

Rule 9(b) provides that:

> "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds

> are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constitutes an abuse of the writ."

In the instant case Neuschafer raised issues on a second habeas corpus petition that had been withheld from an earlier petition. The district court concluded Neuschafer had deliberately withheld unexhausted issues from his first petition. The district court found the fact the claims were unexhausted when the first writ was filed did not constitute an excuse to counter the claim of the State of Nevada that respondent Neuschafer had abused the writ as a matter of law.

The Court of Appeals for the Ninth Circuit disagreed. Without analyzing the issue in any detail, the court relied on a decision it had issued in 1971 in the case of Tannehill v. Fitzharris 451 F.2d 1322 (9th Cir. 1971) and concluded the petitioner's claim that he did not raise

certain issues in his first petition because they were unexhausted precluded a finding that he deliberately withheld those claims from his first petition and abused the writ when he raised them on a second petition. (Neuschafer v. Whitley, supra, 860 F.2d at pp. 1474-1475.)

Review of the Neuschafer and Tannehill decisions shows the court never fully analyzed whether exhaustion is a valid defense to a claim of abuse of the writ. The rationale of the Ninth Circuit apparently is that withholding claims because of rules requiring exhaustion does not constitute a deliberate withholding of claims so as to constitute an abuse of the writ.

The Ninth Circuit is the only Circuit that has expressly dealt with this issue to reach this conclusion. Other circuits have concluded an argument that issues were withheld from an earlier petition in

order to exhaust available state remedies is not a valid excuse to a claim by the state that the petitioner has abused the writ. (See e.g., Neuschafer v. Whitley, supra, 860 F.2d at p. 1476, fn. 9; Jones v. Hess 681 F.2d 688, 695 (10th Cir. 1982); Rudolph v. Blackburn 750 F.2d 302, 305 (5th Cir. 1984); Jones v. Estelle 722 F.2d 159, 165 (5th Cir. 1983); McCorquodale v. Kemp 832 F.2d 543 (11th Cir. 1987); Purnell v. Missouri Department of Corrections 753 F.2d 703, 710 (8th Cir. 1985).)

In Rose v. Lundy, supra, 455 U.S. 509, this Court held that federal habeas petitions that contain both exhausted and unexhausted claims must be dismissed.

Justice O'Connor authored a plurality opinion in Rose, joined by Chief Justice Burger and Justices Powell and Rehnquist, indicating that a petitioner who proceeds in federal court only with the exhausted

claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal habeas petitions that raise those issues because those petitions could be considered as an abuse of the writ. In such a case, the petitioner would have made a conscious decision deliberately to withhold those claims from the initial federal petition.

A plurality of this Court thus has seemingly concluded that withholding unexhausted issues to avoid dismissal of a petition under Rose is an abuse of the writ. This is presumably so because, for whatever the reason, the issues have been deliberately withheld.

This rule should be adopted as a rule for all the federal circuits. First, there is no basis for concluding, as the Court of Appeals here has, that withholding an unexhausted claim is not deliberate and not an abuse of the writ.

There is no reason why a petitioner cannot exhaust all claims in the state court before filing a federal petition for writ of habeas corpus. Issues that are cognizable on habeas corpus are readily apparent from the trial transcript which will have been studied in order to prepare the direct appeal and petition for writ of certiorari.

Moreover, a petitioner may file a petition with only exhausted issues and seek to have the proceedings held in abeyance until all other claims are exhausted. In this manner all issues are dealt with in one proceeding rather than having piecemeal litigation of various issues. (See, Rogers v. Whitley 701 F.Supp. 757 (D. Nev. 1988).) Thus, the failure to raise all issues in one proceeding is deliberate even where the claim is made that issues were withheld because exhaustion was required.

Consequently, there is no reason to conclude, as the Ninth Circuit has, that the failure to exhaust as to some issues is not deliberate and thus can be a defense to a claim of abuse of the writ. This is particularly true as this Court has never indicated the need to exhaust state remedies is an excuse for deliberately withholding a claim. (See, Sanders v. United States, supra, 373 U.S. at pp. 18-19.)

In Sanders this Court noted that nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, and to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

The decision of the Ninth Circuit presupposes that when a habeas petitioner has withheld claims for exhaustion purposes this conduct is not deliberate or designed to vex, harass, or delay.

Rather, the Ninth Circuit opinion assumes the petitioner is somehow acting in good faith. However, there is no basis for such a conclusion since a petitioner may easily exhaust all state claims before seeking habeas corpus relief. Indeed,the only reason for piecemeal exhaustion in most situations would be to vex, harass, or delay. Accordingly, the need to exhaust a claim in state court should not serve as a defense to a claim of abuse of the writ. Rather, in most cases it is evidence of abuse.

Of course, there may be situations where there is a change in the law or new facts come to light that may justify a new claim; however, there is no reason to conclude, as the Ninth Circuit has, that withholding claims from an initial petition because they were unexhausted constitutes a defense <u>as a matter of law</u> to a claim of abuse of the writ.

(Neuschafer v. Whitley, supra, 860 F.2d at p. 1476.)

There is also a strong public policy that weighs against allowing a petitioner to defend against an abuse of the writ defense by claiming he has not exhausted state remedies as to some issues.

Rule 9(b) was designed to ease the burden placed on federal courts by litigious habeas petitioners who file numerous requests for relief. If habeas petitioners were permitted to litigate individual grounds for relief in separate petitions, federal courts would be inundated. By requiring a petitioner to include in his petition all known and available relief, Rule 9(b) protects the petitioner's right to seek habeas relief while also protecting the efficient administration of justice in the federal courts. (Thigpen v. Smith, supra, 792 F.2d 1507, 1513-1514.)

Rule 9(b) also was designed to protect the State from expensive and time-consuming litigation.

> "The Rule facilitates the preservation of evidence, for were it not enforced, the State would be required to preserve all relevant evidence until the time, after several possible petitions, when the claim to which that evidence relates is eventually raised. Of course, evidence is, by its nature, fragile and susceptible to destruction over time, as memories fade and witnesses die or become otherwise unavailable. Finally, correctional systems and rehabilitation programs suffer when a prisoner is continually required to appear before the district court as a result of piecemeal litigation." (Thigpen v. Smith, supra, 792 F.2d at p. 1514.)

Allowing a petitioner to bypass rule 9(b) by claiming he has not exhausted state remedies would allow a habeas corpus petitioner to avoid the goals of the rule. Furthermore, by not placing any requirement the petitioner show cause and/or good faith for not exhausting all claims on an initial petition, the Ninth

Circuit has allowed the petitioner to control the federal court proceedings by deciding on his own whether to exhaust all remedies or proceed in a piecemeal fashion. Allowing a habeas petitioner to decide whether to exhaust all remedies or proceed in a piecemeal fashion takes the power to control the federal court proceedings from the federal judiciary and gives it to the habeas petitioner.

This is particularly true with regard to capital cases where there is a strong interest on the part of the habeas petitioner to delay the proceedings as long as possible. Given the option of exhausting all remedies before proceeding to the district court or proceeding by raising one issue at a time, there is no question the petitioner in a capital case will choose the latter option.

Indeed,the incentive for capital prisoners and their attorneys to delay is

overwhelming. (See Morris, 95 Yale L.J., pp. 371, 377-378, fn. 46; see also, Wainwright v. Spenkelink 442 U.S. 901, 905 (1979) [Rehnquist, J. dissenting from denial of state's application to vacate stay].) "Federal courts are not forums in which to relitigate trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely." (Barefoot v. Estelle 463 U.S. 880, 886-887 (1983).)

As Justice Powell noted in Woodard v. Hutchins, supra, 464 U.S. at pages 378-379:

> "A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward--often in a piecemeal fashion--only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate--even in capital cases--this type of abuse of the writ of habeas corpus." (See also, Teague v. Lane ___ U.S. ___,103 L.E.2d 334, 358, fn. 3. (1989).)

Thus, there is a need to limit the use of habeas corpus as a means of delaying the finality of proceedings. A major step in that direction would be to conclude that an abuse of the writ occurs even in capital cases when claims are withheld because they were not exhausted.

Indeed, this Court has repeatedly indicated that the fact the petitioner is facing the death penalty does not justify abrogation of the normal procedural rules for habeas corpus. (Murray v. Giarratano ___ U.S. ___, 57 U.S.L. Week 4892 (1989).) "We have . . . refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus." (See also Smith v. Murray 477 U.S. 527, 538 (1986); Barefoot v. Estelle, supra, 463 U.S at p. 887; Teague v. Lane, supra, 103 L.Ed.2d at p. 358, fn. 3.)

Accordingly, there is no basis for concluding, as the Ninth Circuit has, that a need to exhaust state remedies is a defense to a claim of abuse of the writ under Rule 9(b). (Sanders v. United States, supra.)

In addition, if the procedure proposed by Justice Alarcon in his concurring opinion in Neuschafer, supra, at page 1482 is adopted, there would be no need for a petitioner to file successive habeas corpus petitions. He would raise all exhausted claims in the first petition, set forth other claims that are unexhausted, and either abandon those claims or return to state court to exhaust those claims while the federal proceedings are held in abeyance. Under this process, all claims are brought to the forefront on the first petition. The filing of any successive petition raising new issues

would then be an abuse of the writ absent some unusual circumstances.

The federal district court in Nevada followed this procedure. (See Rogers v. Whitley, supra, 701 F.Supp. 757; see also, Ybarra v. Sumner 678 F.Supp. 1480, 1484 (D. Nev. 1988).)

Accordingly, the conclusion of the plurality of this Court in Rose v. Lundy, supra, that withholding claims from an initial petition because state remedies have not been exhausted is an abuse of the writ is the correct one and should be the holding of a majority of this Court.

Thus, certiorari should be granted in this case.

CONCLUSION

Amici request that certiorari be granted in this case.

Respectfully submitted,

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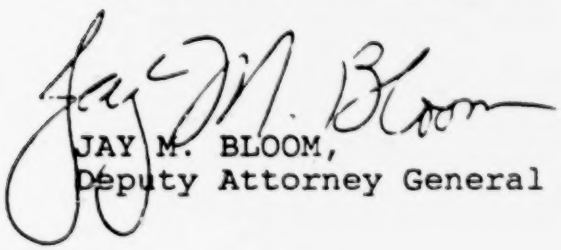

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No: 89-259
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PETER DEMOSTHENES, Warden
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Petitioner

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I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF OF AMICI CURIAE THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, MISSOURI, NEW MEXICO, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, WASHINGTON, WYOMING, AND THE COMMONWEALTH OF PUERTO RICO, IN SUPPORT OF PETITIONER, THE STATE OF NEVADA
as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and FORTY (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 29th day of August, 1989.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, August 29, 1989.

Anne Marie Buford
ANNE MARIE BUFORD

Subscribed and sworn to before me
this 29th day of August, 1989.

Jean M. Burns
Notary Public in and for said County and State

JEAN M. BURNS
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Sept. 17, 1991